ARIZONA DEPARTMENT OF EDUCATION

Edward E. Vance, Due Process Hearing Officer
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("Student"), Petitioner, v. PHOENIX ELEMENTARY SCHOOL DISTRICT ("District"), Respondent.	**IMPARTIAL DUE PROCESS HEARING DECISION AND ORDER** Hearing Dates: October 23 -24 & 26-27, & November 1, 2000 Held at: Phoenix Elementary School District Governing Board Room 1817 North Seventh Street Phoenix, Arizona

Parent:

Parent's Advocate:

Counsel for District: Robert D. Haws, Esq.
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Phoenix, Arizona 85004-2393

An index of names is attached hereto for the benefit of the parties. The index will permit the parties to identify specific witnesses and other relevant persons. The index is designed to be detached before release of this Decision and Order as a public record.

INDEX OF NAMES

v. Phoenix Elementary School District

DES Psychologist	Lawrence Allen, Ph.D.
District School One	Dunbar School
District School Two	Lowell School
District School Three	Herrera School
District IEP Representative	Mrs. Mary Lynn Bolger
Former Special Education Director	Nancy Delecki
Principal - School Two	Ms. Alice Trujillo (Lowell)
Regular Education Teacher	Ms. Griffith (Lowell)
Resource Special Education Teacher	Mr. Guadalupe Mendoza (Lowell)
School Two Social Worker	Mr. Frank Diaz (Lowell)
School Three Social Worker	Carol Ramos (Herrera)
School Psychologist	Ms. Kristin Robaina
Special Education Teacher	Mrs. Lynn Morris (Herrera)

I. INTRODUCTION

A. Procedural Background and Extensions

By letter dated August 17, 2000, Parent requested a due process hearing. Parent's request for a due process hearing was received by District on August 29, 2000, which required the final decision and order to be issued on October 13, 2000, forty-five days after filing the request. On September 7, 2000, the Hearing Officer was appointed, and the Hearing Officer received a copy of the request for due process hearing.

On September 19, 2000, a two hour and forty minute pre-hearing telephone conference was conducted with Parent, a representative of District, and District's counsel. A letter confirming that telephone conference and the procedures that would govern the due process hearing was sent to the parties on September 19, 2000 ("Confirming Letter"). During that conference, District requested an extension of the 45 day timeline due to a number of items, including Parent's need to locate legal representation such as the Arizona Center for Disability Law, District's counsel's calendar, and the steps remaining to be completed in this case; that extension was granted.

On September 29, 2000, a telephone conference was conducted with Parent, Parent's Advocate, and District's counsel; Parent's Advocate had requested a dismissal of the case based on a misunderstanding of the status of the case at that time, and Parent withdrew the request. Parent also requested an extension of the time for disclosure and a two to three week extension for the Due Process Hearing to allow Parent and Parent's Advocate to work on preparing the case. Parent's Advocate only became involved in the case on September 26, 2000, and Parent's request for an extension was not opposed by District. The extension request was granted.

On October 24, 2000, on the second day of the Due Process Hearing, the parties jointly requested a recess until October 26, 2000, to enable the parties to continue settlement discussions. The parties also jointly requested an extension for issuance of the final decision and order to November 13, 2000; the joint request was granted.

B. Pre-Hearing Motions Filed

During the September 19, 2000 pre-hearing telephone conference, Parent agreed to file a list of issues for the due process hearing to clarify Parent's request for due process. On September 22, 2000, Parent timely filed a list of 21 issues ("Parent Issue List"). On September 25, 2000, District filed a Motion to Dismiss, requesting dismissal of Parent's request for a due process hearing on the grounds that none of Parent's issues listed in the Parent Issue List come within the protection of the Individuals with Disabilities Education Act (IDEA). On September 28, 2000, a one-hour telephone conference was conducted with Parent, Parent's Advocate, a representative of District, and District's counsel discussing the issues to be heard at the due process hearing. During that September 28, 2000 telephone conference, Parent requested an independent educational evaluation from the District. The Hearing Officer ordered District to respond to Parent's request on September 29, 2000. In a letter to the Hearing Officer, District indicated that District was not consenting to Parent's request for an independent educational evaluation, and District requested that the appropriateness of Student's evaluation be added to the list of issues for the Hearing. Parent's list of issues, filed with the Hearing Officer on September 22, 2000, also raised the issue of an independent educational evaluation. On September 28, 2000, the Hearing Officer issued an Order Denying in Part And Granting in Part District's Motion to Dismiss And Setting Issues for Hearing. That Order set the

issues for the Due Process Hearing, as set forth in Section II below.

On the evening of October 20, 2000, Parent's Advocate filed a fax with a notation that it was a Motion to Vacate, indicating that Parent had agreed to settle this matter without a hearing. District also filed a letter indicating that Parent's request for a hearing had been withdrawn because the parties had reached a compromise. No settlement agreement between the parties was provided. At 10:39 p.m. on October 20, 2000, Parent left a voice message on the answering machine at Hearing Officer's office stating that Parent had not given anyone permission to withdraw Parent's hearing request. Transcript of Hearing, pp. 934-935. Since Parent had filed the request for due process and had not withdrawn that request, the motion and request to vacate the hearing was denied pursuant to a letter to the parties dated October 21, 2000.

C. Subpoenas

On October 16, 2000, Parent filed with the Hearing Officer a request for subpoenas to be issued to numerous witnesses; a number of the subpoenas were for current District employees which the District stated would appear at the due process hearing without the need for a subpoena. Two of Parent's witnesses, DES Psychologist, and Former Special Education Director for District, were not on District's witness list. Because Parent and Parent's Advocate are not law trained, the Hearing Officer prepared (based on subpoena forms in the Arizona Rules of Court), and then issued subpoenas for DES Psychologist, and Former Special Education Director. On October 18, 2000, Parent though Parent's Advocate requested that the subpoena to DES Psychologist be quashed, and Hearing Officer quashed the subpoena pursuant to an Order Quashing Subpoena on [DES Psychologist] dated October 18, 2000.

D. Exhibits and Briefs

Testimonial and documentary evidence were admitted at the Hearing. Seven (7) witnesses testified at the hearing. Transcript of Due Process Hearing ("Tr."). District objected to Parent's Exhibits numbered 23 and 24 on the grounds that they were related to a mediation; Hearing Officer determined that these exhibits would not be admitted into the record. Thus, Parent's Exhibits numbered 1 through 22 and 25 through 32 ("P. Ex."), and District's Exhibits numbered 1 through 23 ("D. Ex.") were admitted into the record. Since Parent was not represented by an attorney, no hearing briefs were requested or submitted.

E. Hearing Procedures

As noted earlier, Parent and Parent's Advocate are not law trained and were not familiar with hearing procedures. To help ensure the development of a full record on which to make a decision, both parties were allowed ample opportunity to question witnesses, including direct, cross, re-direct, and re-cross and were allowed follow up questions after the Hearing Officer asked questions. Parent and Parent's Advocate were not skilled in asking questions of witnesses and to ensure that the record would be adequate, Hearing Officer asked questions on crucial points relating to the issues to be determined in this case.

II. ISSUES

Pursuant to the Order Denying in Part And Granting in Part District's Motion to Dismiss And Setting Issues for Hearing, dated September 28, 2000, the issues to be determined in this due process decision are:

(1) Did District appropriately evaluate Student?

(2) Is Parent entitled to an independent educational evaluation of Student?

(3) Is District's placement of Student appropriate?

(4) Did District provide Student a free appropriate public education (FAPE) by complying with the procedures set forth in the IDEA and its regulations?

(5) Was the IEP developed through these procedures "reasonably calculated to enable the child to receive educational benefits" to provide FAPE to Student?

(6) Did District provide FAPE by providing appropriate related services?

III. FINDINGS OF FACT

1. From September 8, 1997, to February 2, 1998, Student, an African-American, attended District School One, and received special education services under the eligibility classification of Speech-Language Impairment. D. Ex. 15; P. Exs. 29 & 30.

0. From February 3, 1998, to April 13, 2000, Student attended several charter schools and was home schooled. P. Ex. 28; D. Ex. 2.

0. On March 21, 2000, Student was evaluated by DES Psychologist. An Arizona Department of Economic Security ("DES") Disability Determination Service Psychological Evaluation, dated March 30, 2000 ("March 30, 2000 Psychological Evaluation"), was prepared based on that evaluation. Among other things, the March 30, 2000 Psychological Evaluation indicated:

(1). Under "REASON FOR REFERRAL", that "The Claimant was referred by Disability Determination Services for a psychological evaluation. In addition, the examiner was asked to provide information regarding an attention deficit hyperactivity disorder and academic delays." p. 1.

(2). DES Psychologist reviewed the individualized education plan for Student

dated November 21, 1997, whereby Student was identified as displaying a severe language impairment, and was receiving speech and language services. p. 1.

(3). DES Psychologist reviewed records from a psychiatric examination of Student indicating that Student was evaluated on January 1, 2000, and diagnosed as having attention deficit hyperactive disorder (ADHD), combined type, and that Ritalin was prescribed. p.2.

(4). Student displayed some indications of hyperactivity and distractibility during the one-on-one testing with DES Psychologist. p. 5

(5). DES Psychologist's Diagnostic Impression included ADHD, combined type, and borderline intellectual functioning, but included a "Rule out" of mild mental retardation and learning disorder, NOS. p. 6. [According to School Psychologist, this means Student clearly meets the criteria for ADHD, combined type, and borderline intellectual functioning. School Psychologist further indicated that "Rule out" means that the examiner does not have enough information to report this diagnosis, but it is a possibility and that other people reading the report should make sure they look for this. Tr. p. 598 & 876.]

(6). DES Psychologist's conclusion was that current information does not warrant a diagnosis of mental retardation based on three determinations: (1) DES Psychologist had no measure of adaptive functioning and no reports on learning difficulties and adaptive behavior in the school setting, (2) there was "some unusual subtest scatter" on the Wechsler Intelligence Test for Children - III, where Student "scored within the Average range on the Vocabulary subtest and on the Object Assembly subtest, which is not typical of children who are mentally retarded" and these particular subtests "called into question the reliability of the overall test results" (emphasis added), and (3) the issue of Student's

attention deficit hyperactive disorder where Student displayed hyperactivity and distractibility in the one-on-one testing situation. pp. 5-6.

(7). DES Psychologist included no recommendations with regard to Student's educational needs. D. Ex. 23; P. Ex. 1.

0. The test results from the March 30, 2000 Psychological Evaluation were not reliable enough for District to have made a determination that Student has Mild Mental Retardation ("MIMR"). [Former Special Education Director (who had recently retired as the director of pupil services for District and had 25 years experience as a special education director in Arizona) testified that if an evaluator thinks test results are not reliable, they would include a statement that they are not reliable test results, and then the test would not be considered. Tr. pp. 434-435 & 564. Former Special Education Director further testified that the purpose of the March 30, 2000 Psychological Evaluation was to make a disability determination for social security funding, and not an educational diagnosis. Tr. pp. 511-512. In contrast, School Psychologist testified that the March 30, 2000 Psychological Evaluation was "very good", "a very thorough report" and "seemed pretty valid to me". Tr. pp. 591, 643 & 874. School Psychologist's self-serving testimony lacked credibility overall (see FOF ¶¶ 17-18), and School Psychologist never explained how School Psychologist relied on test results in which the overall reliability was questioned.]

0. On April 13, 2000, Parent signed a document entitled Welcome Center, which indicated that Student "has not participated in any special program." D. Ex. 3.

0. On April 14, 2000, Student enrolled in District School Two. D. Ex. 15. Student was initially placed in the regular classroom at District School Two. Tr. p. 170.

0. Sometime between April 14, 2000, and April 25, 2000, Parent informed teachers and administrators at School Two that Parent wanted Student placed in a classroom with a smaller student-to-teacher ratio and/or a smaller classroom. Tr. pp. 378-385, 430 & 704. District was trying to accommodate Parent's desires. Tr. pp. 562-564. Regular Classroom Teacher had also expressed concerns about Student. Tr. pp. 413-414.

0. On April 25, 2000, there was a staff meeting with the Resource Special Education Teacher, School Two Social Worker, Principal - School Two (for a portion of the meeting), and Parent. At that April 25, 2000 meeting, School Two Social Worker handed Parent a document entitled Prior Written Notice [and a Procedural Safeguards Notice]; that document did not indicate exactly what District School Two was proposing or refusing to change. Tr. p. 265; P. Ex. 21. At that meeting it was determined that Student would be placed in a special education program: a diagnostic MIMR placement at District School Two. Testimony of School Two Social Worker. On April 25, 2000, Parent signed a Parental Permission for Special Education Placement form consenting to a diagnostic placement (MIMR) for Student at District School Two. D. Ex. 22. Parent raised the issue of ADHD at the April 25, 2000 staffing meeting. Tr. p. 315.

0. On or after April 25, 2000, and after the staffing meeting, School Two Social Worker gave Parent the Normative Adaptive Behavioral Checklist (NABC). School Psychologist testified that the NABC showed Student was more than two standard deviations below the norm; neither the NABC nor the written results of the NABC were included in the evidence. [There is conflicting evidence of the exact date that the NABC was given, and School Psychologist testified that it was given on April 24, 2000. However,

School Two Social Worker's testimony that it was given after the April 25, 2000 staffing meeting is given more weight since the NABC was administered by School Two Social Worker.] Tr. pp. 326, 601-603, & 846-847. There is no evidence in the record that a copy of the NABC evaluation results were given to Parent.

0. On or about April 25, 2000, Student also began receiving resource room pull out services (for reading and writing) for 90 minutes a day. Resource Special Education Teacher was Student's teacher in the resource room. Tr. pp. 739-744.

0. On April 27, 2000, Resource Special Education Teacher gave Student the Brigance Comprehensive Inventory of Basic Skills; the results of that test were not reviewed with Parent. A summary of some or all of the results of the Brigance were written on the draft individualized education program (IEP) prepared for Student by Resource Special Education Teacher. This draft IEP was prepared sometime between April 25 and April 28, 2000. Tr. pp. 699-700, 708, 732 & 743-745; P. Ex. 14.

0. On or before April 28, 2000, District officials determined that Student would be placed in an mild mental retardation (MIMR) self-contained classroom; this placement was based on directives from the School Psychologist and Former Special Education Director to School Two Social Worker. Tr. pp. 295-300.

0. On May 1, 2000, School Two Social Worker, School Psychologist, and Parent (the "Multidisciplinary Evaluation Team") met to review Student's evaluation, progress and services. A Multidisciplinary Conference Report dated May 1, 2000, indicates Student is eligible for special education with a "MIMR label", and that a self-contained MIMR placement was recommended. D. Ex. 17.

0. On May 1, 2000, Student was receiving educational services in the regular

classroom and 90 minutes a day of resource pull-out. Tr. p. 170.

0. On May 1, 2000, there was a meeting immediately following the Multidisciplinary Evaluation Team ("MET") meeting. District alleges that this was an IEP team meeting, but no written notice of an IEP meeting (and no accompanying notice of procedural safeguards) were provided to Parent. School Two Social Worker, School Three Social Worker, District IEP Representative, and Parent attended the alleged IEP team meeting. Tr. p. 331. [There was conflicting evidence about whether School Psychologist attended the alleged IEP team meeting, but School Psychologist had no recollection of the meeting, could not recall attending the meeting, could not recall what was discussed at the meeting, could not recall who else attended the meeting, could not recall seeing any of the individuals who signed Student's IEP at the meeting, and could not recall holding an IEP document at the meeting. Tr. 331, 606, 609-611, 636- 638, 647, 652-654, and 686. The District IEP Representative and the School Three Social Worker did not testify at the Due Process Hearing.]

0. Student's draft IEP (see FOF ¶ 11) was not discussed and was not revised at the alleged IEP team meeting on May 1, 2000. [School Two Social Worker is the only person who testified at the Due Process Hearing that attended the alleged IEP team meeting on May 1, 2000 (see FOF ¶ 15). School Two Social Worker repeatedly testified that School Two Social Worker did not recall any discussion by anyone at the meeting on various crucial IEP issues.] Tr. pp. 335-343

0. On May 1, 2000, School Psychologist prepared a document entitled "Transfer Review", which states that School Psychologist reviewed the March 30, 2000 Psychological Evaluation (see FOF ¶ 3), that the diagnosis ruled out mild mental retardation because

there was not an adaptive scale included in the report, and that Parent completed a Normative Adaptive Behavior Checklist at District School Two, and that Student's score based on that Parent-completed checklist fell within the MIMR range. The Transfer Review indicates that District relied on the March 30, 2000 Psychological Evaluation in determining Student's educational needs. School Psychologist did not adequately review the March 30, 2000 Psychological Evaluation to make a determination of its validity. D. Ex. 18; Tr. pp. 602, 614-615, & 617-619.

0. The Transfer Review prepared by School Psychologist further states that ten Components of Psychological Report were included in the March 30, 2000 Psychological Evaluation: (1) reason for referral, (2) educationally relevant medical findings, (3) educational history, (4) statement of educational disadvantage, (5) developmental history, (6) classroom observation, (7) instructional strategies, (8) types of tests used and results, (9) current hearing and vision, and (10) educational evaluation. D. Ex. 18. School Psychologist testified that in order to be considered valid in the State of Arizona, psychological reports have to include these components. Tr. p. 602; D. Ex. 18. The March 30, 2000 Psychological Evaluation did not include a statement of educational disadvantage, classroom observation, instructional strategies, current hearing and vision or an educational evaluation. D. Ex. 23; P. Ex. 1. Student had received a hearing and vision test at District School Two (D. Ex. 4), but there was no evidence that School Psychologist reviewed these test results before preparing the Transfer Review. There had been classroom observation of Student (by Student's teachers) before the Transfer Review was prepared but there was no evidence that any of Student's teachers attended the meeting of the Multidisciplinary Evaluation Team to discuss the classroom observations,

and no evidence that the School Psychologist received or reviewed information about those classroom observations before preparing the Transfer Review. Tr. p. 621. [School Psychologist initially testified that all ten components were included in the March 30, 2000 Psychological Evaluation, but after questioning regarding specific components, School Psychologist admitted that all the components were not included; School Psychologist attempted to justify the inclusion of instructional strategies, but finally admitted that the evaluation "did not specifically list instructional strategies". Tr. pp. 602, 616-619, & 629-632. School Psychologist's testimony was evasive, self-serving, and inconsistent, and thus it was not credible. Since School Psychologist's assessment of the March 30, 2000 Psychological Evaluation conflicts with the actual report, School Psychologist's opinions regarding Student's meeting the MIMR eligibility standards and the appropriateness of Student's evaluations are given no weight. See Tr. pp. 603-606, 654-657.]

0. School Psychologist made no attempt to obtain the medical report diagnosing Student with ADHD (although Parent had signed an authorization to release such records to School Two on April 18, 2000). Tr. pp. 846-848; P. Ex. 27. School Psychologist never considered that an evaluation of Student for ADHD should be obtained based on the information School Psychologist had that Student had been diagnosed with ADHD, and never considered what impact ADHD would have on the special education and related services that Student should receive. Tr. pp. 845-853; D. Ex. 18.

0. Sometime after the alleged IEP meeting on May 1, 2000, Student's IEP was revised by Special Education Teacher at District School Three (without an IEP meeting) to add, among other things, the frequency and duration of service, initiation and projected mastery dates of short term instructional objectives, the programs that Student would

participate in with students without disabilities, and a checkmark that Behavior was a special factor to be considered. Special Education Teacher also changed from "yes" to "no" the checkmark that indicated that Student would participate in the Norm-Referenced SAT-9 assessment and added a rationale for such non-participation. Compare D. Ex. 5 with P. Ex. 14; Testimony of Special Education Teacher, Tr. pp. 88, 141, 163-164, & 174-175.

0. Special Education Teacher, Resource Special Education Teacher, and Regular Education Teacher did not attend the alleged IEP team meeting on May 1, 2000. Tr. pp. 65, 83-84, 87-89, 169, 735-738.

0. The May 1, 2000 IEP provides, among other things:

(1) Student qualifies for MIMR services in the MIMR self-contained classroom.

(2) Student's categorical eligibility is listed as MIMR.

(3) Speech services will be determined at a later time.

(4) Specialized transportation is to be provided, but no other related services.

(5) Goals and objectives based on state standards. [District is apparently on the "cutting edge" in having all of the form goals and objectives included in individualized education programs based on Arizona Academic standards, and teachers in District do not come up with their own goals and objective. District's intent is to "individualize" such goals and standards based on picking out the appropriate paragraphs for each child. Tr. pp. 170, 439-442.

(6) Under the Section entitled "Documentation of Participants in Attendance at IEP Meeting", there are signatures of 5 people: Parent, District Three School Social Worker, Special Education Teacher, Resource Special Education Teacher, and District

IEP Representative. Two of those people, Special Education Teacher and Resource Special Education Teacher, testified that they did not attend the alleged IEP meeting; Resource Special Education Teacher apparently signed the IEP because he/she had initially drafted the IEP. School Two Social Worker attended the alleged IEP meeting but did not sign the May 1, 2000 IEP.

The May 1, 2000 IEP does not indicate that Student has ADHD, and does not indicate any particular needs or services based on ADHD. D. Ex. 5 & P. Ex. 15; Tr. pp. 65, 83-84, 87-89, 160, 735-738.

0. On May 2, 2000, Student was admitted to District School Three, to implement the May 1, 2000 IEP, and the MIMR self-contained placement. D. Ex. 7.

0. On May 24, 2000, District School Three was aware that Student had difficulty in focusing and attending in large or small group activities in the MIMR self-contained placement, that Student had difficulty controlling Student's impulses, and that Student continually demanded attention usually in a disruptive manner. D. Ex. 9; P. Ex. 4.

0. The placement of Student in the special education program is with the consent of Parent. D. Ex. 20.

0. District moved very quickly in placing Student in a special education program. Tr. pp. 443, 457-458, and 674.

0. On August 16, 2000, Parent withdrew Student from District School Three, noting on the Official Notice of Pupil Withdrawal that "Teachers Asst refused to asst child with disability. ADHD". D. Ex. 11; Tr. pp. 220-221.

0. On August 17, 2000, Parent prepared the due process request in this case; Parent hand delivered the request for Due Process letter to the Arizona Department of

Education on August 18, 2000. District received the request on August 29, 2000 from the Arizona Department of Education. That due process request indicated that on August 16, 2000, Parent observed the teacher's aide refusing to help Student in the classroom with a project. It further indicated that Special Education Teacher and the teacher's aide forgot or overlooked the fact that Student has an extremely short attention span, difficulty organizing Student's thoughts, and a constant need for redirection among many other problems or barriers in learning.

0. There is no evidence that any speech-language evaluation was performed or reviewed on or after May 1, 2000, in connection with the May 1, 2000 IEP.

IV. CONCLUSIONS OF LAW

1. Burden of Proof

The Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, et. seq., at the due process hearing. Seattle Sch. Dist. v. B.S., 82 F.3d 1493, 1498 (9th Cir. 1996); Clyde K. Ex rel. Ryan K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398 (9th Cir. 1994). The burden of proof is the duty of affirmatively proving a fact in dispute. For each issue raised by Parent, District has the burden of proving, by a preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education ("FAPE") to Student.

2. Did District appropriately evaluate Student?

IDEA requires that District conduct a full and individual evaluation of Student before providing special education and related services to Student. 20 U.S.C. §1414(a),(b), and (c); 34 C.F.R. §300.531. There are numerous requirements for those evaluation procedures, including:

(1) that tests and other evaluation materials include those tailored to assess specific areas of educational need;

(2) that Student be assessed in all areas of suspected disability; and

(3) that the evaluation is sufficiently comprehensive to identify all of Student's special education and related service needs whether or not commonly linked to the disability category in which Student has been classified.

34 C.F.R. §300.532 (d), (g) & (h).

Mild mental retardation is defined under Arizona law as "performance on standard measures of intellectual and adaptive behavior between two and three standard deviations below the mean for children of the same age." A.R.S. §15-761(14). District determined that Student would be serviced under an MIMR label based on test results measuring intellect that were not reliable enough for District to have made such a determination. FOF ¶¶ 3-4. District had no reliable measure of Student's measure of intellectual behavior. Thus, it was not proper to place Student in an MIMR category of eligibility without additional testing. District's presumptive labeling of Student is especially illuminating given that Congress found, in enacting the IDEA Amendments of 1997, that: "Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart." 20 U.S.C. §1401(c)(8)(C).

District failed to evaluate Student for attention deficit hyperactivity disorder (ADHD), an area of suspected disability, and to assess the impact of ADHD on Student's special education and related service needs. Under IDEA, a child diagnosed with ADHD may qualify a child for special education services under the eligibility category of "Other Health Impairment". 34 C.F.R. §300.7(c)(9). District knew that Student had been diagnosed with ADHD, and District acknowledged that Parent had advised District on May 25, 2000 of Student's ADHD. FOF ¶¶ 3, 8 & 17. But, District made no attempt to obtain a copy of Student's medical diagnosis of ADHD or to complete any evaluations of Student for ADHD. FOF ¶ 19. Whether or not Student qualifies for the eligibility category of Other Health Impairment, the impact of ADHD can impact Student's special education and related service needs, and District needed to obtain sufficient information regarding Student's ADHD to ensure District was meeting Student's needs. 34 C.F.R. §300.532. The May 1, 2000 IEP does not address any special education and related service needs related to Student's ADHD, or even mention that Student has ADHD. FOF ¶ 22.

District failed to evaluate Student for speech and language impairments, an area of suspected disability. District knew that Student had previously been receiving special education speech and language services. FOF ¶¶ 3 & 17. The May 1, 2000 IEP merely states that "speech services will be determined at a later time". FOF ¶ 22. There is no evidence that any speech-language evaluation was performed or reviewed in connection with the May 1, 2000 IEP. FOF ¶ 29. The IEP is required to state the specific special education and related services to be provided to Student, and the projected date for the beginning of such services and the anticipated frequency, location and duration of such services. 34 C.F.R. §300.347(a)(3) & (6). District does not have the option of delaying

indefinitely an evaluation of Student for speech services.

Parent prevails on this issue.

3. Is Parent entitled to an independent educational evaluation of Student?

Parent has the right to an independent educational evaluation at public expense if Parent disagrees with an evaluation obtained by District. 34 C.F.R. §300.502(b). Parent included an independent educational evaluation on Parent's list of issues. Parent requested an independent educational evaluation from the District during a pre-hearing telephone conference with the parties, and District agreed that the issue of Parent's right to an independent educational evaluation could be considered in this case. Alternatively, District would be required to initiate its own due process hearing to show that its evaluation was appropriate (or to ensure that the independent educational evaluation was provided at public expense). 34 C.F.R. §300.502(b)(2). It is in the interest of both parties to have this determination made in this case as it provides a timely resolution of the matter.

The test results from the March 30, 2000 Psychological Evaluation were not reliable FOF ¶3-4. The March 30, 2000 Psychological Evaluation did not include the required components, and/or those components were not properly reviewed and assessed by District. FOF ¶ 18. District has not shown, by a preponderance of the evidence, that District's evaluation of Student for MIMR was appropriate. Thus, Parent is entitled to an independent educational evaluation to determine whether Student falls within the eligibility category of MIMR.

District was on notice that Student had ADHD, and that ADHD could impact Student's specific educational needs. District took no steps to obtain and review the psychiatrist's evaluation of Student's AHDH or to obtain their own evaluation of Student for

ADHD. FOF ¶19. District's failure to fully evaluate Student in all areas of suspected disability makes District's evaluations of Student inappropriate. See Grapevine-Colleyville Indep. School District, 28 IDELR 1276 (July 17, 1998). Since District's evaluation was inappropriate, Parent is entitled to an independent educational evaluation of Student for ADHD.

District knew that Student had previously been receiving special education speech and language services. FOF ¶ 3 & 17. The May 1, 2000 IEP merely states that "speech services will be determined at a later time". FOF ¶ 22. The IEP is required to state the specific special education and related services to be provided to Student, and the projected date for the beginning of such services and the anticipated frequency, location and duration of such services. 34 C.F.R. §300.347(a)(3) & (6). IDEA does not permit District to simply indicate that services will be determined at a later time. If District was unable to determine at the time of the alleged IEP team meeting whether speech services were required, an evaluation of Student should have been performed. Since District's evaluation was inappropriate, Parent is entitled to an independent educational evaluation of Student for speech and language impairments.

Parent prevails on this issue.

4. Is District's placement of Student appropriate?

The determination of whether a placement is appropriate is usually based on the following considerations: (1) the educational benefits of full-time placement in the regular classroom; (2) the nonacademic benefits of such placement; (3) the effect the disabled child has on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. Sacramento City Unified School District v. Rachel H., 14 F.3d

1398, 1404 (9th Cir. 1994). As discussed below, under the facts of this case, these four placement considerations cannot be determined.

The placement decision is to be made by a group of persons knowledgeable about the child, the meaning of the evaluation data and the placement options. 34 C.F.R. §300.552(a)(1). In this case, the underlying evaluation of Student was inappropriate. Thus, placement could not have been made based on appropriate evaluation data.

Placement is also to be based on a child's IEP. 34 C.F.R. §300.552(b)(2). District selected Student's placement before the Multidisciplinary Evaluation Team met on May 1, 2000, and before the alleged IEP team meeting on May 1, 2000. FOF ¶ 12. Additionally, as discussed below, there were numerous procedural violations of IDEA's procedural requirements in the formulation of the May 1, 2000 IEP.

There is also no evidence that Student has progressed in the MIMR self-contained placement since Student has only briefly attended District School Three under the May 1, 2000 IEP. FOF ¶¶ 23 & 27.

In these circumstances Student's placement cannot be determined to be appropriate. The appropriate placement of Student can only be determined after appropriate evaluations are performed, an appropriate IEP team meeting is held, and an appropriate IEP is developed for Student.

Parent prevails on this issue.

5. Did District provide Student a free appropriate public education (FAPE)?

The United States Supreme Court has set forth a two part inquiry to determine whether FAPE has been provided. First, is whether District has complied with the procedures set forth in the IDEA and its regulations. Second, is whether the IEP

developed through these procedures is "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, 458 U.S. 176, 205 (1982).

1. Did District provide Student a free appropriate public education (FAPE) by complying with the procedures set forth in the IDEA and its regulations?

Failure to follow the procedures set forth in IDEA can result in a denial of FAPE if such failure either (1) results in the loss of educational opportunity or (2) seriously infringes the parents' opportunity to participate in the IEP formulation process. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479, 1484 (9th Cir.1992).

District is required to provide a written notice of any IEP meeting to Parent. That written notice must include the purpose, time, and location of the meeting, and who would be in attendance (including the positions of staff). 34 C.F.R. §300.345(b)(1); Ariz. Admin. Reg. § R7-2-401(F). District is also required to give Parent information on procedural safeguards at the time that notice of an IEP meeting is given. 20 U.S.C. §1415(d)(1)(B). District failed to provide any written notice of the alleged IEP meeting held on May 1, 2000. FOF ¶ 15. District's failure to provide the required meeting notice and procedural safeguards violates IDEA's requirements even though Parent attended the alleged IEP meeting on May 1, 2000.

Under IDEA, a meeting of the IEP team for a child is required to be conducted, and an IEP is to be developed at the IEP team meeting. 20 U.S.C. §1414; 34 C.F.R. §§ 300.343-300.347. Required IEP team members include (1) at least one regular education teacher of the child (if the child is, or may be participating in the regular education environment), (2) at least one special education teacher of the child, and (3) an individual

who can interpret the instructional implications of evaluation results. 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. § 300.344. There was no regular education teacher, no special education teacher, and no individual who was qualified to interpret the instructional implications of evaluation results at the alleged IEP meeting of May 1, 2000, as required by IDEA. FOF ¶¶ 15 & 21. IDEA imposes upon District the duty to conduct a meaningful meeting with the appropriate parties. W.G., 960 F.2d at 1485.

The IEP meeting is designed to serve as a communication vehicle between parents and school personnel, as equal participants, to make joint, informed decisions regarding: (1) the child's needs and appropriate goals; (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals, and ideally to reach a consensus regarding the child's educational needs. Appendix A to IDEA regulations, ¶ 9. An IEP is not to be completed before an IEP meeting, and if drafts are prepared before the meeting, there must be a full discussion with the child's parents of the drafted content and the child's needs and the services to be provided to meet those needs. Appendix A to IDEA regulations, ¶ 32.

At the time of the alleged IEP meeting on May 1, 2000, an IEP had already been drafted for Student. FOF ¶ 11. That draft IEP was not discussed or revised in any way at the alleged IEP meeting on May 1, 2000. FOF ¶ 16. Then after the alleged IEP meeting, extensive additional changes were made to the IEP without the input, consent or agreement of Parent, or other IEP team members. FOF ¶ 20.

Additionally, that draft IEP contained only form goals and objectives generated

based on Arizona academic standards. FOF ¶ 22. District did not even consider whether additional goals and objectives were required in the May 1,2000 IEP for meeting Student's "needs that result from [Student's] disability to enable [Student] to be involved in and progress in the general curriculum" or "to participate in appropriate activities" or "other educational needs that result from [Student's] disability." 34 C.F.R. § 300.347(a)(2); 20 U.S.C. § 1414(d)(1)(A)(ii). IDEA requires that District make these considerations. If the District considers having only goals and objectives generated based on Arizona academic standards to be "cutting edge", it is only because it violates the explicit terms of the law. It is not improper for District to use form goals and objectives as an initial starting point, but District cannot comply with the requirements of IDEA by stopping there without considering and preparing additional goals and objectives as required by IDEA.

District's extensive failure to develop a complete and individualized educational program according to the procedures of IDEA are sufficient, alone, to result in a denial of FAPE. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479, 1484-1486 (9th Cir.1992). The extensive failure to meet any of the procedural requirements of IDEA makes it difficult to determine whether the alleged IEP meeting held on May 1, 2000 can even be appropriately termed an "IEP meeting". These extensive procedural violations resulted in the loss of educational opportunity for Student because the May 1, 2000 IEP was not based on any discussions by an appropriately constituted IEP team of Student's educational needs and the services provided to meet those needs. These extensive procedural violations seriously infringed Parent's opportunity, and really effectively deprived Parent of any meaningful opportunity, to participate in the IEP formulation process. As such, these extensive procedural violations of IDEA denied FAPE to Student. 960 F.2d

at 1484.

District's primary justification for these extensive procedural violations was District's attempt to quickly respond to Parent's desires. FOF ¶¶ 7 & 26. District is responsible for complying with the requirements of IDEA. This is not a case of cutting through some red tape to accommodate a parent and expedite the provision of appropriate services to a child. The elaborate and highly specific procedural requirements of IDEA were totally ignored.

2. Was the IEP developed through these procedures "reasonably calculated to enable the child to receive educational benefits" to provide FAPE to Student?

In order to provide FAPE to Student, the May 1, 2000 IEP must be "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, 458 U.S. at 205. To meet this standard, Student must be provided specialized instruction and related services, which are individually designed to provide educational benefit to Student. Rowley, 458 U.S. at 203. District's initial evaluation of Student for MIMR was seriously flawed, and District did not perform evaluations for ADHD or speech-language impairment. As described above, the procedural violations of IDEA prevented any meaningful determination of Student's individual educational needs by an appropriate IEP team. The May 1, 2000 IEP cannot be reasonably calculated to enable Student to receive educational benefits because District did not prove that the May 1, 2000 IEP was individually designed to provide educational benefit to Student. Rowley, 458 U.S. at 203.

3. Did District provide FAPE by providing appropriate related services?

District did not provide appropriate related services. Under the IDEA, a "free appropriate public education" includes not only special education, but also "related

services." 20 U.S.C. §1401(8). Related services include "transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education." 20 U.S.C. s 1402(22); 34 C.F.R. §300.24(a). Related services also include parent counseling and training, which means (i) assisting parents in understanding the special needs of their child, (ii) providing parents with information about child development, and (iii) helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP. 34 C.F.R. §300.24(b)(7).

District's initial evaluations of Student were either seriously flawed or not performed. Additionally, the procedural violations of IDEA prevented any meaningful determination of Student's related service needs by an appropriate IEP team. Thus, the appropriate related services for Student cannot be determined at this time.

The May 1, 2000 IEP required that specialized transportation be provided. FOF ¶ 22. No evidence was presented regarding what type of specialized transportation was required for Student or that any specialized transportation was provided to Student. FAPE requires that related services be provided in accordance with Student's IEP. 34 C.F.R. § 300.350. District has the burden of proof of establishing that related services were provided, and District did not meet that burden.

Parent prevails on this issue.

6. Arizona Regulation Findings

The Arizona regulations governing due process standards for special education require that a hearing officer render findings of fact and a decision on specific identified issues. Ariz. Admin. Code § R7-2-405(H)(4). Those specific issues are addressed as

follows:

(1). As discussed in detail above, the evaluation procedures utilized in determining Student's needs were not appropriate in nature and degree.

(2). As discussed in detail above, the diagnostic profile of Student on which the placement under the IEP was based was not substantially verified.

(3). As discussed in detail above, Student's rights have not been fully observed.

(4). As discussed in detail above, the placement has not been determined to be appropriate to the needs of Student.

(5). The placement of Student in the special education program is with the written consent of Parent. FOF ¶ 25.

7. Responsibility of District to Student

District argued at the Due Process Hearing, without legal support, that District has no obligation to Student because Parent withdrew Student from School Three on August 16, 2000, before the due process request in this case was filed.[1] District asserts that District has no current obligation to Student because Student is not enrolled at District's School Three. Parent withdrew Student because Parent thought School Three was not treating Student (with Student's disabilities) appropriately. Parent then quickly filed the due process request in this case.

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[1] FOF ¶¶ 27 & 28. District initially raised the issue that Student was not currently enrolled at School Three at the September 19, 2000 pre-hearing telephone conference. District was permitted to, but failed to, file any pre-hearing motions on this issue. See Confirming Letter and September 26, 2000 letter from the Hearing Officer to the parties confirming that the time period for District's filing of such motion had lapsed. There is case law that determined that current enrollment is important to an IDEA claim but that law is based on a specific Minnesota statute that does not apply in Arizona. See Thompson v. Board of the Special School District No. 1, 144 F.3d 574 (8th Cir. 1998), and Smith v. Special School District No. 1, 184 F.3d 764 (8th Cir. 1999).

District is required to provide special education services to all children with disabilities within the district. A.R.S. §§ 15-763 & 15-764. District had the legal obligation to provide a FAPE to Student when Student enrolled in School Two on April 14, 2000. District's legal obligation cannot end because Parent was not willing to subject Student to the delivery of inappropriate educational services when District failed to provide Student with a FAPE. Additionally, under IDEA, children with disabilities must be identified, located and evaluated as part of the provision of FAPE. 20 U.S.C. § 1412(a)(3). 34 C.F.R. §§300.125 & 300.300(a)(2). In short, Parent's withdrawal of Student from School Three did not affect District's obligation to provide a FAPE to Student.

V. ORDER

IT IS ORDERED THAT:

(1) District shall provide Parent with an independent educational evaluation at District expense to evaluate Student for: (a) attention deficit hyperactivity disorder (ADHD), (2) mental retardation, and (c) speech and language impairments. No later than November 15, 2000, District shall provide Parent with the criteria that District uses when District initiates such evaluations, and a list of at least five qualified examiners for each type of evaluation that is ordered hereunder. District shall take appropriate action to ensure prompt payment of all examiners selected by Parent.

(2) Parent shall obtain evaluations no later than December 15, 2000, and ensure that such examiners provide a certified copy of all evaluation results and an explanation of the results to District and to Parent. All copies of such evaluations shall be prepared at District expense.

(3) Within five (5) business days after District's receipt of the independent educational

evaluations, District shall send written notice of an IEP meeting to Parent, in compliance with the requirements of IDEA and Arizona law, and that IEP meeting shall be held no later than fifteen (15) business days after District's receipt of the independent educational evaluation(s); provided, however, that such meeting time may be extended solely for the purpose of accommodating Parent's schedule. The IEP meeting shall include Parent.

(4) On or before the date of the noticed IEP meeting, if Parent wants Student to receive a free appropriate public education from District, Parent shall enroll Student in School Three, and District shall accept Parent's enrollment of Student in School Three.

(5) District shall ensure that all school employees required as members of the IEP team under IDEA, including, without limitation, a regular classroom teacher and Student's special education teacher, attend the IEP meeting. The IEP team shall consider the results of the independent educational evaluations as well as other District evaluation information in preparing an IEP for Student. District shall ensure that the IEP prepared for Student is based on joint, informed decisions of Parent and school personnel after a full discussion at the IEP meeting of Student's needs and the services to be provided to meet those needs. District shall ensure that the IEP team considers what related services are required under IDEA and its implementing regulations, including, without limitation, transportation and parent counseling and training.

VI. APPEAL

Either party has the right to appeal this Decision and Order to the Office of

Administrative Hearings within thirty-five (35) days after receipt of this Decision and Order.

Notice of Appeal may be sent to: Arizona Department of Education, Exceptional Student Services, 1535 West Jefferson, Phoenix, Arizona 85007.

Ordered this __ day of November 2000.

_____
Edward E. Vance
Due Process Hearing Officer

Copy of the foregoing mailed
Certified Return Receipt Requested
this _____ day of November, 2000, to:

(Parent)

Parent's Advocate

Copy of the foregoing mailed
this ____ day of November 2000, to:

Dr. Deborah Jones
Phoenix Elementary School District
1817 North 7th Street
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